Supreme Court, U. S.
FILED
FEB 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-215

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Petitioner

v.

JOHN R. PARK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

GREGORY M. HARVEY
ORVEL SEBRING
2107 The Fidelity Building
Philadelphia, Pa. 19109
(215) 491-9427
Attorneys for Respondent

MORGAN, LEWIS & BOCKIUS
Of Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

INDEX

Table of Contents

PAGE

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTES INVOLVED 3

STATEMENT 4

A. The Proceedings in the District Court 4

B. The Decision of the Court of Appeals 12

SUMMARY 13

ARGUMENT 15

I. Prejudicial Errors Throughout The Charge Required Reversal of Park's Conviction 15

A. The charge was contrary to the statute as construed by this Court in the *Dotterweich* decision 17

B. The crucial portion of the charge erroneously directed a verdict of guilty based solely on Park's status as chief executive officer of the corporation 21

C. The remainder of the charge failed to provide "appropriate guidance" or any other meaningful standard for the jury 22

II. The Court of Appeals Correctly Stated The Principles Applicable to a Retrial 24

A. Conviction under the statute as construed in Dotterweich requires proof of causation consisting of acts of omission or commission which directly or constructively cause the violations with which the defendant is charged 24

PAGE

B. The holding in the *Abbott Laboratories* decision concerning "knowledge" is a holding sought by the Government in order to justify certain grand jury inquiries held to be immaterial and prejudicial by a trial court 27

C. The Government is correct that criminal liability of an individual charged under the statute is never a vicarious liability for the conduct of others 30

D. No impractical burden is imposed by requiring proof of acts of omission or commission which cause the offenses charged, because the Government has always previously required evidence of such acts as a condition precedent to prosecution of individual corporate officers 32

III. Evidence of Alleged Prior Crimes Should Have Been Excluded at The First Trial and Will Be Admissible at a Subsequent Trial Only if The Need For Such Evidence Outweighs Its Prejudicial Effect 33

CONCLUSION 35

CITATIONS

Cases:

Bihn *v.* United States, 328 U.S. 633 22

Bollenbach *v.* United States, 326 U.S. 607 22

Boyd *v.* United States, 142 U.S. 450 34

Cool *v.* United States, 409 U.S. 100 22

H. B. Gregory Co. *v.* United States, 502 F.2d 700 (1974), *pending on petition for certiorari*, No. 74-142 31

PAGE

Holland *v.* United States, 348 U.S. 121 ..... 14, 26

In Re Winship, 397 U.S. 358 26

Lelles *v.* United States, 241 F.2d 21 (9th Cir. 1957), *cert. denied*, 353 U.S. 974 31

Lovely *v.* United States, 169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 34

M. Kraus & Bros., Inc. *v.* United States, 327 U.S. 614 22

New York Central & H.R.R. Co. *v.* United States, 212 U.S. 481 18

United Brotherhood of Carpenters *v.* United States, 330 U.S. 395 ..... 13, 21

United States *v.* Abbott Laboratories, C.A. No. 74-1230 (4th Cir. Oct. 2, 1974) 27

United States *v.* Balint, 258 U.S. 250 24

United States *v.* Cassaro, Inc., 443 F.2d 153 (1st Cir. 1971) 31

United States *v.* Diamond State Poultry Co., 125 F. Supp. 617 (D. Del. 1954) 32

United States *v.* Dotterweich, 320 U.S. 277 .... Passim. 2, 7, 12, 13

United States *v.* Kaadt, 171 F.2d 600 (7th Cir. 1948) 32

United States *v.* Mills, 7 Pet. 138 18

United States *v.* Parfait Powder Puff Co., 163 F.2d 1008 (7th Cir. 1947), *cert. denied*, 332 U.S. 851 32

United States *v.* Shapiro, 491 F.2d 335 (6th Cir. 1974) 31

United States *v.* Weiler, 323 U.S. 606 22

United States *v.* Woods, 484 F.2d 127 (4th Cir. 1973) 34

PAGE

Statutes:

Federal Food, Drug and Cosmetic Act of 1938, 52 Stat. 1040, as amended, 21 U.S.C. 301 *et seq.*: 3

Section 301(k), 21 U.S.C. 331(k) 3, 5, 7

Section 303(a), 21 U.S.C. 333(a) 3

Section 303(b), 21 U.S.C. 333(b) 3

Section 402(a), 21 U.S.C. 342(a) 4

Miscellaneous:

Devitt & Blackmar, Federal Jury Practice and Instructions, § 8.02 (1970) 23

D. F. O'Keefe, Jr. & M. H. Shapiro, "Personal Liability Under the Federal Food, Drug, and Cosmetic Act—The Dotterweich Doctrine," 30 Food Drug Cosmetic Law Journal 3 (Jan. 1975) 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-215

UNITED STATES OF AMERICA, Petitioner

v.

JOHN R. PARK

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinions in the court of appeals (Pet. App. 1A-12A) are reported at 499 F.2d 839.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1974 (Pet. App. 13A). On July 26, 1974, Mr. Chief Justice Burger extended to August 31, 1974, the time within which to file a petition for a writ of certiorari.

The petition was filed on August 30, 1974, and granted on November 11, 1974 (A. 73). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution of a corporate officer for doing or causing acts resulting in the adulteration of food, the instructions to the jury were proper under the statute as construed in *United States* v. *Dotterweich*, 320 U.S. 277, when:

(a) the jury was twice instructed that the issue for their determination was whether the individual defendant held a position of authority and responsibility in the business of the corporation of which he was president; and

(b) the jury was never instructed to determine whether the individual defendant was responsible for the doing or causing of the acts charged in the information.

2. Whether, upon a subsequent trial, instructions should be given that for an accused individual to be found guilty on charges of doing or causing acts resulting in adulteration of food:

(a) the jury must find that he was personally responsible for the acts constituting the crimes charged, and

(b) as to a corporate officer, such personal responsibility would result from any acts of commission or omission which caused the adulteration of the food, including (but not limited to) gross negligence and inattention in discharging his corporate duties.

3. In a prosecution conducted on the theory that the accused might be convicted merely upon proof that he held a position of authority and responsibility in a corporation, did the introduction of evidence of an alleged prior offense, remote as to both time and place, require reversal since on the prosecutor's theory of the case there was no need for such evidence which would outweigh the prejudice resulting from its admission (although on retrial such evidence might be admissible)?

STATUTES INVOLVED

Section 301(k) of the Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1042, as amended, 21 U.S.C. 331(k), provides:

The following acts and the causing thereof are prohibited:

* * * * *

(k) The alteration, multilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.

Sections 303(a) and (b) of the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1043, as amended, 21 U.S.C. 333(a) and (b) provide:

(a) Any person who violates a provision of section 331 of this title shall be imprisoned for not more than one year or fined not more than $1,000, or both.

(b) Notwithstanding the provisions of subsection (a) of this section, if any person commits such a violation after a conviction of him under this section has become final, or commits such a violation with the intent to defraud or mislead, such person shall be

imprisoned for not more than three years or fined not more than $1,000, or both.

Section 402(a) of the Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1046, as amended, 21 U.S.C. 342 (a), provides in part:

> A food shall be deemed to be adulterated * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed susbtance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health * * *

STATEMENT

A. THE PROCEEDINGS IN THE DISTRICT COURT

This case arises from one of two similar prosecutions commenced in the District of Maryland following inspections of the Baltimore warehouses of two national retail food chains, both of which have their corporate headquarters in Philadelphia, Pennsylvania. Both cases were commenced within a year following the release of a report by the Comptroller General which recommended increased enforcement activity by the Food and Drug Administration ("FDA").[1]

In the first of the two District of Maryland cases, Food Fair, Inc., and a Food Fair vice president based in Towson, Maryland, were charged with violations of Section 301(k) of the Food, Drug and Cosmetic Act, *supra* at page 3, based on the presence of rodents in Food Fair's Baltimore warehouse. The charges against the individual corporate officer were subsequently dismissed at the request of the Government. Food Fair, Inc., pleaded guilty.[2]

[1] Comptroller General of the United States, Dimensions of Insanitary Conditions in the Food Manufacturing Industry, Report to the Congress, No. B-164031(2) (April 18, 1972).

In the second of the two cases, Acme Markets, Inc. ("Acme") and its president, John R. Park, respondent herein, were charged in a five-count information (A. 4-9) with violations of Section 301(k) of the Act, 21 U.S.C. § 331(k).

The alleged violations consisted of having caused five foods being held in Acme's Baltimore warehouse for sale after shipment in interstate commerce to become adulterated, principally "by reason of being rodent gnawed" (A. 9).

Acme is a national retail food chain employing approximately 36,000 persons with 874 retail outlets along the East and West Coasts, twelve main warehouses and four special warehouses (Pet. App. 5A). Park had his office in Acme's corporate headquarters in Philadelphia.

Acme's "Division 6" was headed by a divisional vice president Robert W. McCahan ("McCahan") with his office in Towson, Maryland, and consisted of a warehouse complex in Baltimore and approximately 110 retail outlets. The Baltimore warehouse was described in the trial testimony as a complex of approximately 250,000 square feet including an "older building" of three stories with a basement. An FDA inspection of this facility, which took twelve days in November and December 1971, discovered

[2] The circumstances concerning the prosecution of Food Fair and the dismissal by the Government of charges against the only individual named as a defendant in that case were developed in extensive post-verdict proceedings in the instant case, including affidavits and hearings held May 25, 1973, and July 5, 1973, on the issue of whether the Government's having named respondent Park as a defendant constituted an abuse of prosecutorial discretion. The trial court found that the instant case "comes as close to an abuse of that discretion as any one you would find" (Tr. of July 5, 1973, p. 32), but held that he must "reluctantly conclude that the motion must be denied . . . ." (Ibid, p. 33).

rodent infestation in the first floor and basement of the older building (A. 19-21). At the end of the inspection, the FDA issued to Edwin Zahn, the warehouse manager, a list of observations which described the rodent infestation (A. 20-23).

On January 27, 1972, the FDA sent a letter to Park, as president of Acme, with a copy sent to McCahan, described in the FDA letter as "Vice President in charge of the Baltimore Division" (A. 64-65). The FDA letter described the conditions found in the Baltimore warehouse and attached a copy of the list of observations previously given to the warehouse manager. McCahan responded to the letter on February 7, 1972 (A. 66-69), describing in detail the steps being taken to cure the deficiencies.

The Government's evidence established that "a great deal of effort" had been "made in the way of cleaning up the warehouse" (A. 23) following the 1971 inspection, and also "that there was still evidence of rodent activity" (A. 23) during a subsequent inspection in March 1972. At least one structural deficiency which might have contributed to the rodent activity found in the March 1972 inspection—a rusted door—was not discovered by the FDA until the second inspection (A. 26). A second letter was sent by the FDA to Park, again with a copy to McCahan. McCahan again responded to the letter, and, according to his testimony at trial, made an "all-out drive" to get in compliance (A. 37). McCahan testified that close to $70,000, including the cost of merchandise destroyed, new doors, rodent-proofing alterations, new automatic sweeping equipment, the hiring of ten additional people solely for cleaning duties, a supervisor for this new staff, and other efforts, was spent to cure the violations (A. 38).

An informal hearing pursuant to 21 U.S.C. § 335 was held in June 1972 at the Baltimore office of the FDA and attended by McCahan and other officers of Acme, not including Park.

In March 1973, the five-count information (A. 4-9) was filed in the United States District Court for the District of Maryland, charging both Acme and Park with violations of Section 301(k) of the Act, 21 U.S.C. § 331(k). The first four counts (A. 4-8) relate to violations discovered in the November and December 1972 inspection; the fifth count charges a violation found in the March 1972 inspection (A. 8-9).

Prior to trial, Park filed a motion seeking a bill of particulars as to Park's alleged liability for the violations (A. 10). The Government responded to the motion (A. 14) by disclosing that the evidence "will not show that the defendant personally performed the acts" described in the information but that the "Government's evidence will simply show that the defendant was a corporate officer who, under law, bore a relationship to the receipt and storage of food which would subject him to criminal liability under *United States* v. *Dotterweich*, 320 U.S. 277 (1943)" (A. 15).

Acme Markets, Inc. pleaded guilty to the five counts. At the trial of Park, the parties stipulated that the items of food described in the information had been shipped in interstate commerce and were being held for sale in the Baltimore warehouse (Tr. 34-38). An FDA investigator testified concerning evidence of rodent infestation and other insanitary conditions found in the Baltimore warehouse during the November and December inspection (A. 20-22), and concerning the results of the second inspection in March 1972:

> "Q. What did you observe in the course of your second inspection, sir? A. We found that there had been a great deal of effort made in the way of cleaning up the warehouse, reducing the total inventory and in rodent-proofing measures. We also found there was still evidence of rodent activity in the building and in the warehouses and we found some rodent-contaminated lots of food items" (A. 23).

The chief of compliance of FDA's Baltimore office testified concerning the correspondence with Park and McCahan (A. 30-34). The Government then called McCahan as a witness (A. 34-35). McCahan testified that the Baltimore warehouse was within the "geographical area" for which he was responsible and that he had prepared the letter responding to the first FDA letter to Park (A. 35). On cross-examination, McCahan testified concerning his efforts to "comply one hundred percent with the rules and regulations . . . ." (A. 38).

The Government's last witness was Acme's corporate assistant secretary who read a corporate by-law providing, in pertinent part, that the chief executive officer "shall, subject to the board of directors, have general and active supervision of the affairs, business, offices and employees of the company" (A. 40). The Government then introduced excerpts from Acme's Delaware corporate franchise tax records showing Park as president (Tr. 146-47).

At the conclusion of the Government's case in chief, the evidence concerning Park individually consisted, as the Government acknowledged to the court of appeals (Appellee's Brief, pp. 4-6) of the correspondence directed by the FDA to Park with copies to McCahan, and McCahan's response; the identification of Park as chief executive officer of Acme, and the text of Acme's by-law providing that the chief executive officer shall have "general and active supervision of the affairs, business, offices and employees of the company."

Respondent moved for a judgment of acquittal, which was denied by the trial court with the explanation that under *Dotterweich*, 320 U.S. 277, "the ultimate judgment should rest with the jury" (A. 42).

Park then testified on his own behalf concerning the care taken in sanitation matters, the technical competence of the persons concerned with sanitation (A. 44-46), and

the procedures followed in response to the FDA letter addressed to himself and McCahan (A. 46-47).

On cross-examination, Park testified that he was "responsible for the activities and affairs of the whole company" and that sanitation was "a thing that I am responsible for in the entire operation of the company" (A. 48-49). Over objection (A. 50-51), the Government introduced a letter (set forth at A. 70-71), concerning an alleged prior violation involving a rodent infestation in Acme's Philadelphia warehouse in March 1970 (A. 51-55).

The Government's requests for charge included a Requested Instruction No. 3 (A. 72) that "in order to find a defendant guilty on any count, you must find beyond a reasonable doubt for that count . . . As to the defendant, John R. Park, that he held a position of authority and responsibility in the operation of the business of Acme Markets, Inc." The charge as given used the Government's Requested Instruction No. 3 as the basis for the first two paragraphs dealing with Park's criminal liability. The substantive text of the charge (omitting the standard form instructions not at issue in the instant case) is as follows:

> "In order to find the Defendant guilty on any count of the Information, you must find beyond a reasonable doubt on each count, first, that the food that was held was held for sale in the Acme warehouse after shipment in interstate commerce.
>
> Secondly, that the food involved was held in unsanitary conditions in a warehouse with the result that it consisted, in part, of filth or where it may have been contaminated with filth.
>
> Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated.

However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets.

The corporation, Acme Markets, Incorporated, has already entered a plea of guilty to the charge placed against it, and, while that plea does not imply, in any way, the Defendant Park is guilty, the fact that the materials in question are foods held for resale after shipment in interstate commerce and held under unsanitary conditions are issues that are beyond question in the case and must be accepted by you.

The statute makes individuals, as well as corporations, liable for violations. An individual is liable if it is clear, beyond a reasonable doubt, that the elements of the adulteration of the food as to travel in interstate commerce are present. As I have instructed you in this case, they are, and that the individual had a responsible relation to the situation, even though he may not have participated personally.

The individual is or could be liable under the statute, even if he did not consciously do wrong. However, the fact that the Defendant is present and is a chief executive officer of the Acme Markets does not require a finding of guilt. Though, he need not have personally participated in the situation, he must have had a responsible relationship to the issue. The issue is, in this case, whether the Defendant, John R. Park, by virtue of his position in the company, had a position of authority and responsibility in the situation out of which these charges arose" (A. 61-62).

Respondent objected to the instructions on the ground that they were not consistent with this Court's decision in *Dotterweich* (A. 62-63) and did not sufficiently define the standards applicable to Park's responsibility. After an extended colloquy, in which counsel referred to a discussion had previously in chambers concerning the instructions, the court stated:

> "Let me say this, simply as to the definition of the 'responsible relationship.' *Dotterweich* and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court. As I have indicated to counsel, I am quite candid in stating that I do not agree with the decision; therefore, I am going to stick by it" (A. 63).

The court cut off further discussion by stating to respondent's counsel "You have your objection " (A. 63). The jury returned a verdict of guilty on all counts.

Extensive post-verdict proceedings were had in which Park renewed his objections to the charge and the admission of evidence and also sought an acquittal on motions and affidavits alleging an abuse of prosecutorial discretion based on the Government's having prosecuted him solely because of his position as chief executive officer (see n. 2 at p. 5, *supra*). The trial court initially indicated a belief that an abuse of discretion requiring acquittal had been established (Tr. of May 25, 1973, p. 27), but subsequently concluded that the motion should be denied (n.2 at p. 5, *supra*). The court then imposed a fine of $50 on each of the five counts, substantially less than the one year's imprisonment or $1,000 fine, or both, provided for a first offense by 21 U.S.C. § 333(a), *supra* at p. 3, stating that by imposing this sentence he would "re-enforce" his previous "comments" on the merits of the prosecution's case (Tr. of July 5, 1973, p. 34).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals reversed the judgment of conviction and remanded the case for a new trial. The majority held that the charge did not correctly state the law as declared in *United States* v. *Dotterweich*, 320 U.S. 277. The court of appeals held that *Dotterweich* dispensed with the need to prove "awareness of wrongdoing" by Park but did not dispense with the need to prove that Park was "in some way personally responsible for the act constituting the crime" (Pet. App. 4A). The court concluded that since the statute prohibits "causing" the adulteration of food, the conduct required to be proved would be "acts of the accused which *cause* the adulteration of such food" (Pet. App. 4A). (Emphasis by the court of appeals.) The court enlarged upon this standard by stating that such "action" by respondent "may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of the food" (Pet. App. 6A).

In response to the contention that the requirement of such proof would make enforcement more difficult, the court stated:

> "Nevertheless, the requirements of due process are intended to favor fairness and justice over ease of enforcement. We perceive nothing harsh about requiring proof of personal wrongdoing before sanctioning the imposition of criminal penalties" (Pet. App. 6A).

The court also held that the evidence of the alleged prior violation in Philadelphia in 1970, not charged in the information, should have been excluded as unduly prejudicial because, as the case was tried and submitted to the jury, "there was no actual need for the Philadelphia evidence" (Pet. App. 8A). The court expressly allowed the district court on retrial "to determine the admissibility of this 'prior crime' evidence in light of developments" (Pet. App. 9A).

SUMMARY

1. The court of appeals reversed the judgment of conviction because the instructions to the jury were contrary to this Court's interpretation of the Federal Food, Drug and Cosmetic Act of 1938 as declared in *United States* v. *Dotterweich*, 320 U.S. at 277. In the charge the jury was twice instructed that that "main" or "only" matter for their determination was whether the defendant John R. Park "held a position of authority and responsibility in the business of Acme Markets" (A. 61). Since respondent Park had been selected for prosecution because he was president and chief executive officer of Acme Markets, this portion of the charge was contrary to the fundamental principle that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408.

The Government relies largely on the trial court's use of the phrase "responsible relation" and "responsible relationship," quoted from the *Dotterweich* decision; 320 U.S. 277, 281, 285, to sustain the remainder of the charge. But those phrases were not intended in *Dotterweich* to define for a jury the evidence necessary to a conviction; instead, *Dotterweich* refers to the "variety of conduct," 320 U.S. at 285, which would justify a conviction under "settled doctrines of criminal law . . . ." 320 U.S. at 284. In the instant case the trial Judge believed that the basis of Park's possible liability "was not even subject to being defined by the Court." (A. 63). The remainder of the charge reflected that belief and accordingly deprived the jury of the "appropriate guidance" which this Court intended in *Dotterweich*. 320 U.S. at 285.

2. The principles applicable to a retrial were correctly defined by the court of appeals. The statute as construed in *Dotterweich* dispenses with proof of "awareness of wrongdoing" by an individual defendant, but does not relieve the prosecution of the obligation to prove that an individual defendant has by acts of omission or commission directly or constructively caused the violations with which he is charged. As in any federal criminal prosecution, the Government has the burden to prove every element of the offense beyond a reasonable doubt. *Holland* v. *United States*, 348 U.S. 121, 138.

The language concerning "knowledge" contained in a subsequent decision by the same court of appeals, cited by the Government as proof that the court of appeals has now "in effect, repudiated the holding of *Dotterweich*," is actually language taken from the Government's own brief filed in that case.

The Government is correct that the statute as construed in *Dotterweich* does not impose a "vicarious" criminal liability on individuals for violations caused by others, and the reported cases confirm that in no case has an individual been convicted without proof of "the personal responsibility" which the court of appeals required be established on retrial in the instant case.

The broad range of proofs available to the Government on retrial, including "any of a host of other acts of commission or omission" which cause the violations (Pet. App. 6A), imposes no difficult or impractical burden. The guidelines used by the FDA and the Department of Justice have always (prior to the instant case) required exactly the same type of evidence before the commencement of criminal proceedings against individual corporate officers.

ARGUMENT

I. PREJUDICIAL ERRORS THROUGHOUT THE CHARGE REQUIRED REVERSAL OF PARK'S CONVICTION.

Reversible error was committed throughout the instructions, commencing with the error induced by the prosecutor, who persuaded the trial court to summarize the issue of respondent's personal criminal liability in language taken from the *dissenting* opinion of Mr. Justice Murphy in *Dotterweich*, 320 U.S. at 285-93.

The opening paragraph of the dissent in *Dotterweich* states the argument of the four-Justice minority against affirmance of the conviction. According to Mr. Justice Murphy:

> "There is no evidence in this case of any personal guilt on the part of the respondent. . . . Guilt is imputed to the respondent solely on the basis of his authority and responsibility as president and general manager of the corporation." 320 U.S. 285-86.

The Government's requested instruction No. 3 submitted to the trial court in the instant case (A. 72) not only sought to impute guilt to respondent Park "solely on the basis of his authority and responsibility as president" of Acme, but also directed the jury to find him guilty on that basis alone.

Instruction No. 3 was intended by the Government to summarize in four paragraphs the findings necessary to convict both Acme and Park. The first two paragraphs referred to factual proof of interstate shipments and the holding of goods under unsanitary conditions; the third paragraph referred to Acme's liability (and became irrelevant when Acme pleaded guilty); the text of the fourth paragraph, in its entirety, was as follows:

"4. As to the defendant, John R. Park, that he held a position of authority and responsibility in the operation of the business of Acme Markets, Inc."

The trial court charged the jury on the crucial issue of Park's liability in the exact words requested by the prosecutor. After defining the elements of interstate shipment and unsanitary conditions, the trial court stated:

"Thirdly, that John R. Park held a position of authority in the operation of the business of Acme Markets, Incorporated."

"However, you need not concern yourselves with the first two elements of the case. The main issue for your determination is only with the third element, whether the Defendant held a position of authority and responsibility in the business of Acme Markets." (A. 61)

This portion of the charge, combined with other portions also reflecting the view that criminal liability might be found without evidence of any "personal guilt" on the part of the respondent, as Mr. Justice Murphy contended was done in *Dotterweich*, caused the court of appeals to reverse (Pet. App. 3A). The court stated:

"The [trial] court charged the jury that the sole question was 'whether the Defendant held a position of authority and responsibility in the business of Acme Markets'; that Park could be found guilty 'even if he did not consciously do wrong' and even though he had not 'personally participated in the situation' if it were proved beyond a reasonable doubt that Park 'had a responsible relation to the situation.' We conclude that this charge does not correctly state the law of the case, that the conviction of Park on all counts must be reversed and a new trial awarded." (Pet. App. 3A)

A. The charge was contrary to the statute as construed by this Court in the Dotterweich decision.

The Government had contended in the district court and argued in the court of appeals "that the conviction may be predicated solely upon a showing that the defendant, Park, was the President of the offending corporation" (Pet. App. 4A; Appellee's Brief, pp. 4-6, 16-17). The instructions given to the jury were largely based on that theory.

The court of appeals rejected the Government's theory after analysis of the text of the statute as construed by the opinion of this Court in *Dotterweich*, 320 U.S. at 277. In a footnote to the opinion, the court of appeals also concluded that the trial transcript in the *Dotterweich* case did not support the Government's trial theory because the transcript showed "that Mr. Dotterweich personally made every executive decision and had direct personal supervisory responsibility over the physical acts which resulted in the interstate shipment of misbranded and adulterated drugs." (Pet. App. 3A-4A, n.3).[3]

[3] The Dotterweich prosecution was against both a corporation (Buffalo Pharmacal Company, Inc.) in business as a jobber of drugs and its president, Dotterweich. The printed Record filed in this Court shows not only that Dotterweich was personally responsible for every aspect of the corporate defendant's business but also that he testified at trial in a manner which emphasized that personal responsibility.

The violations charged in the case arose from two shipments of digitalis alleged to be less potent than required by law and a shipment of pills alleged to be misbranded because the contents, although correctly stated on a label, did not conform with the National Formulary definition. Both the corporation and Dotterweich vigorously defended on the merits of every issue, claiming that the digitalis was of proper potency, attacking the Government's tests, and contending that the pills were properly labeled. Except for expert witnesses, the defendants' testimony was presented by Dotterweich himself, who was called and recalled on four separate occasions in a two-day trial (Record 125, 140, 156, 159). The evidence showed that the corporate defendant had been "created" by Dotterweich, in the words of defense counsel (R. 63), was owned by him, had approximately 26 employees, working on one floor of an office building, with Dotterweich

The issue presented to this Court in *Dotterweich* was whether an individual employed by a corporation could *ever* be held liable under the Act, since the court of appeals had held, 131 F.2d 500, that the structure of the guaranty provisions of the Act manifested a congressional intent to exclude such liability unless the corporation was operated as the "alter ego" of the individual.

The opinion of the Court by Mr. Justice Frankfurter noted that the penalty provisions of the statute reach "any person" who violates its substantive provisions, and that the word "person" was defined to include a corporation. 320 U.S. at 281. The opinion then states:

> "But the only way in which a corporation can act is through the individuals who act on its behalf. *New York Central & H.R.R. Co.* v. *United States,* 212 U.S. 481. And the historic conception of a 'misdemeanor' makes all those responsible for it equally guilty, *United States* v. *Mills,* 7 Pet. 138, 141, a doctrine given general application in § 332 of the Penal Code (18 U.S.C. § 550)."

Note 3—Continued

as president and "General Manager." Dotterweich was the only supervisor when he was present (R. 18) and "he was there most every day all day" (R. 17). During the testimony by Dotterweich, his counsel almost invariably used the word "you" to refer to actions taken in respect of the challenged shipments even when referring to actions taken by other employees who worked under Dotterweich's supervision, such as "I show you the original order that *you* sent" (R. 128); "did *you* buy any digitalis tablets from any other concern?" (R. 141); and "Mr. Dotterweich, did *you* continue to so sell digitalis tablets from that batch after that?" (R. 142) (emphasis added). On cross-examination, Dotterweich admitted that "When I am in the place, I am in charge," that he was "the boss," and that he must have been in charge on a day when one of the challenged shipments went out (R. 143-44).

The jury in the *Dotterweich* case found the individual defendant Dotterweich guilty on all counts but disagreed as to the guilt of the corporation. The verdict is explainable by the extent to which the defendants' evidence had been identified with Dotterweich personally, particularly by use of the words "I," "my," "his," and "you," while the corporate defendant was infrequently referred to except in the formal identification of documents and other exhibits.

Section 332 of the former Penal Code, then codified as § 550 of Title 18, is now codified as 18 U.S.C. § 2 and states the general rule, applicable to all federal crimes, concerning those who aid and abet the commission of an offense:

> "§ 2. Principals
>
> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal." As most recently amended, 65 Stat. 717.

The opinion then considered the basis of the holding by the court below concerning the guaranty provisions of the Act, now codified as 21 U.S.C. § 333(c), and held that "the want of a guaranty does not cut down the scope of responsibility of all who are concerned with transactions forbidden by § 301". The following sentence of the opinion comments on the effect of this holding:

> "To be sure, that casts the risk that there is no guaranty upon all who according to settled doctrines of criminal law are responsible for the commission of a misdemeanor." 320 U.S. at 284.

Particularly important is the reference to "settled doctrines of criminal law" concerning those who "are responsible for the commission of a misdemeanor." This language refers back to the citation, 320 U.S. at 281, of *United States* v. *Mills,* 7 Pet. at 141, which holds that all those responsible for a misdemeanor may be prosecuted as principals, and is the historic origin of the doctrine given general application in the statutory language now codified as 18 U.S.C. § 2.

Of equal importance is the language in which this Court refutes the view that a limiting construction of the Act might be necessary because otherwise the statute would "operate too harshly by sweeping within its condemnation any person however remotely entangled in the proscribed shipment." The opinion then states:

> "But that is not the way to read legislation. Literalism and evisceration are equally to be avoided. To speak with technical accuracy, under § 301 a corporation may commit an offense and all persons who aid and abet its commission are equally guilty." 320 U.S. at 284.

The last sentence, introduced with the words "to speak with technical accuracy" written by a Justice who had an unusual respect for the technical side of the law, is of critical importance as applied to the instant case. When this language is read in context with the earlier citation to former 18 U.S.C. § 550 and "'settled doctrines of the criminal law," the meaning is plain that this Court did not intend to apply to Federal Food and Drug Act violations a special standard in which the jury would enjoy the untrammeled discretion claimed by the Government in the instant case.

The next sentence of the *Dotterweich* opinion further confirms that conclusion.

> "Whether an accused shares responsibility in the business process resulting in unlawful distribution depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." 320 U.S. at 284.

The concluding sentences of the opinion, quoting the comment by trial counsel for Dotterweich that the trial court in that case had delivered "a very fair charge," 230 U.S. at 285, should not be read to validate the charge as

given in *Dotterweich* as a pattern or formula is applicable to all prosecutions of a corporate officer, regardless of the factual issues which are presented by the evidence. As previously noted (n.3 at p. 17, *supra*), there was no significant effort made at that trial to establish a lack of personal liability by the individual defendant if the defenses (which sought to establish a complete absence of liability on the part of both defendants) were not accepted by the jury. Moreover, the correctness of the charge was never at issue in any stage of the *Dotterweich* case, since counsel had raised no objection at trial and no effort was made to argue the correctness of the charge either in the court of appeals or in this Court. Even so, the charge concerning Dotterweich's liability, including the key sentence "was he responsible for the shipment of them in interstate commerce?" (quoted at page 24 n.11 of Brief for the United States) offered considerably more guidance to the jury than was given in the instant case.

B. The crucial portion of the charge erroneously directed a verdict of guilty based solely on Park's status as chief executive officer of the corporation.

A fundamental principle of criminal procedure is that "a judge may not direct a verdict of guilty no matter how conclusive the evidence." *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395, 408.

The instruction in the instant case that the "main issue" for the jury was "only with the third element, whether the defendant held a position of authority and responsibility in the business of Acme Markets" (A. 61), was in every significant sense a directed verdict of guilty. Park was selected as the recipient of the FDA letters and as the defendant to be named individually in the case because of his "position of authority and responsibility in the business of Acme Markets." The instruction therefore used the basis of the Government's selection of Park as the foundation for a direction to find Park guilty.

The error in this crucial portion of the charge requires reversal, even more than did the single error in "36 separate instructions to the jury, which covered some 52 pages of the transcript" in *Cool* v. *United States,* 409 U.S. 100, 106. (Dissenting opinion of Rehnquist, J.).

Even "an equivocal direction to the jury on a basic issue" requires reversal. *Bollenbach* v. *United States,* 326 U.S. 607, 613. The rule that "a conviction ought not to rest on an equivocal direction to the jury on a basic issue," as declared in the *Bollenbach* decision, is equally applicable to convictions under regulatory statutes. *M. Kraus & Bros., Inc.* v. *United States,* 327 U.S. 614, 626-27. (Emergency Price Control Act.)

"Nor is it enough for [this Court] to conclude that guilt may be deduced from the whole record." *Bihn* v. *United States,* 328 U.S. 633, 637. The Court is "not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty." *Weiler* v. *United States,* 323 U.S. 606, 611.

C. The remainder of the charge failed to provide "appropriate guidance" or any other meaningful standard for the jury.

The Government's brief on the merits does not argue the correctness of much of the charge given in the instant case. To the extent that the Government attempts to justify the charge, reliance is placed largely on the trial court's use of the phrase "responsible relation" or "responsible relationship."

In using those phrases, taken from the *Dotterweich* opinion, the trial court acted on the belief that no better definition than "responsible relationship" could be formulated because:

> "*Dotterweich* and subsequent cases have indicated this really is a jury question. It says it is not even subject to being defined by the Court." (A. 63).

This belief led the trial court into the error warned against in the recent edition of Devitt & Blackmar, *Federal Jury Practice and Instructions,* § 8.02, pp. 172-73 (1970):

> "Sometimes counsel will quote verbatim from an appellate court decision dwelling on a point involved in the trial, and urge it as a proposed instruction. Appellate court opinions are written for a purpose different from that for which jury instructions are designed. The point of law may be controlling, but not the language. It is the legal principle, not the words expressing it, which is pertinent and which will be helpful to the jury. Legal points from decided cases should be couched in language appropriate to the facts and to the parties in the lawsuit."

As used in the instant charge, the phrases "responsible relation" and "responsible relationship" were so ambiguous as to leave the jury without any standard whatsoever to determine Park's criminal liability, as defendant's trial counsel vigorously contended (A. 64-65). The Government supports the charge largely on the basis of those phrases, citing the *Dotterweich* opinion. (See Brief for the United States, pp. 22-23).

Even if the phrase "responsible relation" had been intended by this Court as the rule of liability for violations, that phrase alone, without explanation or definition, would not provide the operative words of a charge, for the reasons stated in the excerpt from Devitt & Blackmar quoted above. Moreover, the phrase "responsible relation" was not used in the *Dotterweich opinion,* 320 U.S. at 281, 285, to define the conduct which would constitute a violation of the statute. The phrase is used instead to describe those persons "standing in responsible relation to a public danger" on whom duties are imposed. 320 U.S. at 281,

citing *United States* v. *Balint*, 258 U.S. 250. The second reference to "responsible relation" again refers to "the class of employees which stands in such a responsible relation." 320 U.S. at 285. Since Dotterweich was a person "standing in responsible relation to a public danger," 320 U.S. at 281, by reason of his position as general manager of a drug jobber, there was a "variety of conduct" for which he might be found criminally liable. 320 U.S. at 285. Nor does the *Dotterweich* decision demand that every case commenced by the Government after referral from the FDA be sent to the jury, contrary to the belief of the trial Court in the instant case, who stated his reading of the decision that "the ultimate judgment should rest with the jury" (A. 42) in denying the motion for acquittal at the close of the Government's evidence.

The *Dotterweich* decision holds that liability "depends on the evidence produced at the trial and its submission—assuming the evidence warrants it—to the jury under appropriate guidance." 320 U.S. at 284. The absence of such guidance in the instant trial, combined with the erroneous instruction directing a verdict of guilty if Park "held a position of authority and responsibility in the business of Acme Markets" (A. 61), requires reversal and a new trial.

II. THE COURT OF APPEALS CORRECTLY STATED THE PRINCIPLES APPLICABLE TO A RETRIAL.

A. Conviction under the statute as construed in Dotterweich requires proof of causation consisting of acts of omission or commission which directly or constructively cause the violations with which the defendant is charged.

The court of appeals held that the statute as construed in *Dotterweich* dispensed with the need to prove "awareness of wrongdoing" but did not dispense with the

need to prove "wrongful action" by Park. (Pet. App. 4A). The court reached this conclusion because:

> "As a general proposition, some act of commission or omission is an essential element of every crime. For an accused individual to be convicted it must be proved that he was in some way personally responsible for the act constituting the crime. The Supreme Court recognized this in *Dotterweich:* 'The offense is committed * * * by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws * * *' 320 U.S. at 284."

Unless the statute creates a true "vicarious" liability, by which an individual corporate officer may be criminally liable without "any personal guilt," the court of appeals was correct to require proof of some act of commission or omission. The Government now disclaims any "vicarious" liability for individual corporate officers (Brief, p. 14; see the discussion *infra* at p. 30).

The court noted that the relevant section of the statute prohibits "causing" the adulteration of food (Pet. App. 4A n.4) and accordingly defined "'wrongful action' in this context as acts of the accused which *cause* the adulteration of such food" *(Ibid.)*. The court went on to hold that such acts as to Park "may be gross negligence and inattention in discharging his corporate duties and obligations or any of a host of other acts of commission or omission which would 'cause' the contamination of the food" (Pet. App. 6A) (footnotes omitted).

The Government's argument against this holding is lengthy but difficult to define. At several points, the Government contends that the court has required "affirmative 'wrongful action' by the accused" (Brief, p. 24) or that the court erred "in requiring affirmative 'wrongful action' by a corporate official . . . ." (Brief, p. 15). But these shorthand

expressions misread the court of appeals decision since the court clearly held that acts of omission might be the basis for individual criminal liability and that acts of omission might be used to show participation either "directly or constructively" in the violations (Pet. App. 5A).

If the Government intends the words "affirmative 'wrongful action'" to refer to the Government's obligation to prove acts by the accused which cause the adulteration of the food "directly or constructively" (Pet. App. 5A), then the objection to proof of those acts should also fail. The Government made the same argument in the court of appeals that a requirement of such proof might make enforcement more difficult. The court of appeals stated:

> "Nevertheless, the requirements of due process are intended to favor fairness and justice over ease of enforcement" (Pet. App. 6A).

This Court has held that "proof of a criminal charge beyond a reasonable doubt is constitutionally required." *In Re Winship,* 397 U.S. 358, 362. In any federal criminal prosecution "the Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty." *Holland* v. *United States,* 348 U.S. 121, 138 ("net worth" method of proof of violation of Internal Revenue Code). The court of appeals correctly applied these principles to the instant prosecution, while carefully excluding the necessity, pursuant to the statute as construed in *Dotterweich,* that the Government prove "awareness of wrongdoing."

There is no possible justification now to change the Constitutional standard of proof applicable to all federal criminal prosecutions so as to relieve the Government from proving some act of omission or commission by Park which "directly or constructively" caused the violations.

B. The holding in the Abbott Laboratories decision concerning "knowledge" is a holding sought by the Government in order to justify certain grand jury inquiries held to be immaterial and prejudicial by a trial court.

The Government charges that the court of appeals has recently "compounded" its alleged error in the instant case by having "in effect, repudiated the holding of *Dotterweich*" in a recent decision, *United States* v. *Abbott Laboratories,* No. 74-1230 (4th Cir. Oct. 2, 1974), petition for a writ of certiorari pending, No. 74-699. The Government's brief states:

> "The error of the court below in requiring proof of 'wrongful action' by the defendant is compounded by that court's subsequent decision in *United States* v. *Abbott Laboratories, supra.* In its decision in the present case, the court at least purported to recognize that the 1938 Act 'dispenses with • • • awareness of some wrongdoing' (Pet. App. 4A). In *Abbott Laboratories,* however, the court held that 'responsibility' under the Act 'depends upon knowledge, and • • • on the action or nonaction of the officer or employee after he has obtained knowledge' (slip op., p. 20). In this more recent explication of its view of the 1938 Act, the court of appeals has, in effect, repudiated the holding of *Dotterweich, supra.*" (Brief, p. 25)

The truth is that the holding of the court below in the *Abbott Laboratories* case, and which holding the Government advances as an argument for reversal in the instant case, is a holding sought by the Government and rendered in language substantially similar to that which appears in the Government's brief filed in the *Abbott Laboratories* case.[4]

---

[4] Two Government counsel shown on the brief filed in *Abbott Laboratories* are also shown on the brief filed in this Court in the instant case, but presumably neither was involved in the preparation of both briefs.

In the *Abbott Laboratories* prosecution, the Government had obtained indictments against Abbott Laboratories and five individuals charging violations of the statute resulting from shipments of allegedly adulterated intravenous solutions. The release of the indictments was accompanied by widespread publicity concerning deaths allegedly caused by shipments of the intravenous solution, some of which publicity was alleged by the defendants to have originated with the FDA and the Government prosecutors.

The defendants also alleged that the prosecution was guilty of misconduct before the grand jury, including an examination of one of the defendants (Robert O'Donnell) in which O'Donnell was cross-examined concerning newspaper articles which referred to deaths allegedly caused by the intravenous solution. One of the defense contentions was that the deaths were "in no way involved in the case" but that "the prosecutors repeatedly flaunted the stories of deaths before the grand jury," justifying dismissal of the indictments" (Pet. App. C2, opinion of the district court).

The district court agreed with this contention as one of several grounds on which to quash the indictments:

> "To raise the spector of homicide before the grand jury in an effort to obtain an indictment under an act which requires no *mens rea* is unconscionable conduct" (Pet. App. C18).

The Government then sought in the court of appeals to reverse this holding by establishing a proper basis for having cross-examined O'Donnell concerning the alleged deaths. The Government's brief filed in the *Abbott Laboratories* appeal argues as follows:

> "The offense under Section 301(a) is committed, except under circumstances not here relevant, by all who share in responsibility in the business process of distributing in interstate commerce the adulterated or misbranded drugs. *Dotterweich, supra,* 320 U.S. at 284. Thus, the responsibility of individuals within the Abbott organization for distribution of misbranded products would turn upon their relationship in the corporation to production and distribution activities, and any knowledge they may have with respect to problems arising from use of the drug. For example, an official not normally connected with such activities who was sent to investigate reports of deaths and illnesses of various hospitals might become responsible by reason of his knowledge. The references to deaths, including the questioning of Mr. O'Donnell as to his reactions and those of others upon receiving notice of illnesses and deaths, were therefore within the proper scope of investigation, not unduly prejudicial and not grounds for dismissal of the indictment." (Brief for the United States, p. 29)

The court of appeals agreed with this argument and reversed the district court, stating:

> "Defendants were indicted under 21 U.S.C. § 331(a), which prohibits the introduction of any drug 'that is adulterated or misbranded.' While § 331(a) prescribes a crime of which scienter is not a necessary element, it does not follow that, in addition to Abbott, every employee of Abbott would have potential criminal liability; rather, only those who share in the responsibility of distributing adulterated or misbranded drugs in interstate commerce are potentially criminally liable. *United States* v. *Dotterweich,* 320 U.S. 277, 281, 284 (1943); *United States* v. *Park,* ____ F.2d ____ (4 Cir., June 28, 1974). 'Responsibility' in turn depends upon knowledge, and if knowledge is established it depends further on the action or nonaction

of the officer or employee after he has obtained knowledge. Thus, we think that an inquiry to Mr. O'Donnell of whether he had knowledge from various sources of the charge that Abbott solutions caused deaths, as a prelude to the ultimate inquiry of what action he took with respect thereto, was relevant to the proceedings." (Pet. App. A13-A14).

Comparison of the opinion with the language used in the Government's brief shows that the court of appeals accepted both the argument and the language used by the Government.

Moreover, the argument made by the Government in the *Abbott Laboratories* brief appears to some degree inconsistent with the argument made in the instant case that the Government should be relieved from investigating the nature of Park's relationship to the alleged violations and relieved from proving the acts of commission or omission by Park which directly or constructively caused those violations. Under the Government's own guidelines, as discussed *infra* at p. 33, the FDA and the Department of Justice have never commenced prosecutions against individual corporate officers without first gathering exactly that type of evidence, as the Government was engaged in gathering in the *Abbott Laboratories* investigation.

C. The Government is correct that criminal liability of an individual charged under the statute is never a vicarious liability for the conduct of others.

The Government correctly states that the criminal liability created as to corporate officers by the statute "is not vicarious" (Brief, p. 14), by which respondent understands the Government to mean that a conviction should depend on the conduct of the corporate officer concerning the alleged violations. Conversely, a conviction of one individual should not, on the Goverment's view, depend solely upon the personal guilt of other individuals.

The reported cases support the conclusion that liability under the statute is not vicarious, and show that the FDA has rarely, if ever, established individual criminal liability in cases which did not involve facts showing "the personal responsibility" which the court of appeals required be established on retrial in the instant case. The reported decisions now relied on in the Government's brief (pp. 25-26) all involved such facts as to the individuals named as defendants.

In *H. B. Gregory Co.* v. *United States,* 502 F.2d 700 (7th Cir.), decided March 14, 1974, pending on petition for a writ of certiorari, No. 74-142, the facts established that the individual defendant "was in charge of the sanitation program and specifically the rodent control program in the warehouse; and that he was there on a daily basis" (Appendix 1 to the petition, opinion of the court of appeals, pp. 5-6). In *United States* v. *Shapiro,* 491 F.2d 335 (6th Cir. 1974), the individual defendant had *pleaded guilty* and received a "probated two-year sentence" conditioned upon compliance in the future with the Act. The holding of the court of appeals that the defendant could not avoid revocation of his probation by pleading the defense that the business was subject to agreement of sale at the time of the violations is entirely consistent with the holding of the court of appeals in the instant case. *United States* v. *Cassaro, Inc.,* 443 F.2d 153 (1st Cir. 1971), involved evidence (appearing from the opinion to have been uncontested) that the individual defendant ordinarily was present at the bakery in which the violations were found and was personally in charge of its operations. 443 F.2d at 154, 157. The individual defendant's only contention on appeal was that he had been temporarily "out sick" at the time of the inspection. In *Lelles* v. *United States,* 241 F.2d 21 (9th Cir. 1957), *cert. denied,* 353 U.S. 974, the individual defendant was charged with having "personally" caused the offenses, 241 F.2d

at 24, and was convicted even though the corporate defendant was ordered acquitted. *United States* v. *Kaadt,* 171 F.2d 600 (7th Cir. 1948), is a case similar to *Dotterweich* in which the individual defendants took responsibility for distributing a drug, with printed matter signed by one of the individual defendants, but contended that no violation whatsoever had been committed by anyone, corporation or individual. *United States* v. *Parfait Powder Puff Co.,* 163 F.2d 1008 (7th Cir. 1947), *cert. denied,* 332 U.S. 851, does not involve individual criminal liability. In *United States* v. *Diamond State Poultry Co.,* 125 F. Supp. 617 (D. Del. 1954), the two individual defendants were so much a part of the activities from which the violations arose that the court expressly found for the purpose of sentence that there was "an identity between individual and corporate defendants. . . . " 125 F. Supp. at 620.

In none of these cases did the Government attempt to establish individual criminal liability without proof of acts of the accused which caused the violations.[5]

D. No impractical burden is imposed by requiring proof of acts of omission or commission which cause the offenses charged, because the Government has always previously required evidence of such acts as a condition precedent to prosecution of individual corporate officers.

[5] Commentators have sometimes reached the contrary conclusion that the statute does create a "vicarious" liability, either on the basis of the dissent in *Dotterweich* or because they have used a different definition of "vicarious." One example of the latter is the article by D. F. O'Keefe, Jr. and M. H. Shapiro, "Personal Liability Under the Federal Food, Drug, and Cosmetic Act—The *Dotterweich* Doctrine," 30 Food Drug Cosmetic Law Journal 3 (Jan. 1975), in which the authors state the opinion that "*close and immediate supervisory control by the defendant over the operation in which the violative act occurred has always been present when individuals have been held vicariously liable.*" (Ibid., p. 20) (Emphasis in the original). Evidence of that sort is exactly the evidence described by the court of appeals in the instant case as "evidence of personal guilt."

The FDA's own standards for selection of individuals to prosecute for violations of the statute, as summarized in the Government's brief (pp. 31-32), already include a determination whether some act of omission by a corporate officer has caused a violation. The Government plainly believes that numerous acts of omission by Park caused the Baltimore warehouse violations and spells out in a lengthy footnote (Brief, p. 34 n.19) the factual details of a long series of such alleged omissions. Accordingly, no improper burden will be placed upon the Government by requiring proof at trial of acts of omission or commission constituting causation.[6]

III. EVIDENCE OF ALLEGED PRIOR CRIMES SHOULD HAVE BEEN EXCLUDED AT THE FIRST TRIAL AND WILL BE ADMISSIBLE AT A SUBSEQUENT TRIAL ONLY IF THE NEED FOR SUCH EVIDENCE OUTWEIGHS ITS PREJUDICIAL EFFECT.

The court of appeals held that on retrial evidence of prior violations during 1970 in Acme's Philadelphia warehouse might properly be admitted, depending on "the prosecution's new approach to the presentation of its case" (Pet. App. 9A).

The decision of the court below that the evidence of the 1970 violation should not have been admitted at the first trial was based largely upon the prosecution's trial theory, reflected in the charge, that Park should be convicted if he held "a position of authority and responsi-

[6] An "impractical burden" might be imposed if the Government were required to prove that an officer "knowingly or willfully . . . caused the specific violations" (Brief for the United States, p. 38), but no such requirement is imposed by the court of appeals decision. Nor does that decision require proof that an officer or warehouse manager had knowledge "that a particular lot of food was contaminated" (*Ibid.,* p. 38). These references to "knowledge" perhaps refer to the language in the *Abbott Laboratories* decision, which is discussed *supra* at pp. 27-30, and in which the court of appeals accepted the argument urged by the Government.

bility in the business of Acme Markets" (Pet. App. 8A). In a prosecution conducted on this theory, "in light of the sole issue presented, *need* for the Philadelphia evidence is not apparent" (Pet. App. 8A; emphasis by the court of appeals).

The rule applied by this Court and by the court below is that evidence of other criminal offenses by the defendant, not charged in the indictment or information, is not admissible for any purpose, *Boyd* v. *United States,* 142 U.S. 450, 458; *Lovely* v. *United States,* 169 F.2d 386, 389 (4th Cir. 1948), *cert. denied,* 338 U.S. 834, subject only to a balancing test where need for such evidence outweighs the prejudice which is created by its admission. *United States* v. *Woods,* 484 F.2d 127 (4th Cir. 1973).

During the trial of Park, the prosecution left no doubt in the minds of the jury that the alleged violations described in the FDA letter concerning the 1970 inspection of Acme's Philadelphia warehouse (A. 70) were considered by the Government to constitute "prior crimes" within the meaning of the rule which ordinarily excludes such evidence. In one episode which took place at the close of Park's testimony, which was also the close of all the evidence, Park was examined by his counsel concerning the alleged 1970 Philadelphia violations. Park testified that no one from the FDA had expressed dissatisfaction concerning Acme's handling of the 1970 matter (A. 56). The prosecutor, on recross examination, then asked the question (to which an objection was immediately made and sustained): "Well, you do stand before the jury as a criminal Defendant today, don't you?" (A. 57). This comment was followed by a summation in which the prosecutor referred to the alleged 1970 violations interchangeably with those charged in the information (A. 58-60).

On retrial, both the Government's trial theory and greater restraint in the use of evidence of prior violations may justify admission if the need outweighs the prejudicial effect.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GREGORY M. HARVEY
ORVEL SEBRING
Attorneys for Respondent

Of Counsel:
MORGAN, LEWIS & BOCKIUS